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No. 72

In the Supreme Court of the United States

OCTOBER TERM, 1955

FRANK COSTELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The majority and concurring opinions in the Court of Appeals (Ex. Vol. p. 140–159)[1] are reported at 221 F. 2d 668.

JURISDICTION

The judgment of the Court of Appeals was entered on April 5, 1955 (Ex. Vol. p. 160), and a petition for rehearing was denied on April 14,

[1] The printed record is comprised of three volumes of testimony, consecutively paginated, and a fourth volume (here referred to as "Ex. Vol."), containing the exhibits and the proceedings in the Court of Appeals, which is separately paginated.

1955 (Ex. Vol. pp. 160–161). The petition for a writ of certiorari was filed on May 12, 1955, and was granted on October 10, 1955, limited to the first question presented (R. 161; 350 U. S. 819). The jurisdiction of this Court rests upon 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

May a defendant be required to stand trial and a conviction be sustained where only hearsay evidence was presented to the grand jury which indicted him?[2]

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the

[2] The first question in the petition, to which this Court limited the grant of the writ, is so stated by petitioner. 350 U. S. 819. Although we argue that this broad question should be answered in the affirmative, we believe that this particular case may be more narrowly decided by focusing upon the character of the hearsay evidence involved. Putting the issue in terms merely of "hearsay" poses what may well be an overly general abstraction, neglecting the wide variations among different types of evidence which are all technically hearsay, and thus diverting attention from what may well be the sufficient answer to petitioner's complaint—the fact that the grand jury acted responsibly, on a basis which reasonable men could reasonably deem sufficient to warrant indictment.

land or naval forces, or in the militia, when in actual service in time of war or public danger * * *."

Internal Revenue Code of 1939:

> SEC. 145. PENALTIES.
>
> * * * * * *
>
> (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.
>
> * * * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

STATEMENT

On March 11, 1953, petitioner was indicted in the United States District Court for the Southern District of New York on charges of willfully attempting to evade large parts of his income taxes for the years 1946 through 1949 by filing fraudulent returns, in violation of Section 145 (b) of the Internal Revenue Code of 1939. (R. 1a, 9a–12a.)

Before the trial, petitioner moved (R. 82a–84a) for inspection of the grand jury minutes and dismissal of the indictment, alleging on information and belief that there was "no lawful evidence" before the grand jury which returned it. This motion was denied. (R. 85a–86a.) After a jury trial, petitioner was found not guilty on Count I (involving 1946) and guilty on the remaining counts. (R. 1872a.) On May 17, 1954, he was fined $10,000 on each count and sentenced to imprisonment for five years on each count, the terms to run concurrently. (R. 1886a.)

The Government reconstructed the petitioner's net income by the net worth-expenditures method, beginning with October 18, 1937, a starting point established by oral testimony given by petitioner to a revenue agent at that time.[3] This testimony was transcribed by a stenographer and signed by petitioner, who initialed each page thereof. (Govt. Ex. 23, Ex. Vol. pp. 1–10.) The Government's proof established that between the starting point and December 31, 1945 (the beginning of the first year covered by the indictment), the increases in the visible net worth of petitioner and his wife plus their non-deductible expenditures (after adjustment for non-income funds received) were $202,865.81 in excess of reported income.

[3] This starting point evidence was bolstered, among other things, by admissions petitioner made before a federal grand jury in the same district in 1939. (Govt. Ex. 30, Ex. Vol. pp. 11–31.)

(R. 1456a–1463a, Govt. Exs. 362–362 (e), Ex. Vol. pp. 33–41.) It was then proved that petitioner's true net income and tax for each of the last three prosecution-years, reconstructed on the net worth-expenditures method, was substantially greater than the amounts reported on his income tax returns.[1]

Although petitioner had not requested that his pre-trial motion be "deferred for determination at the trial of the general issue" (Rule 12 (b) (4), Federal Rules of Criminal Procedure), he developed at the trial, by cross-examination of all the Government's witnesses, the fact that none of them had testified before the grand jury except three Treasury agents. (R. 1397a, 1575a, 1597a.)

These agents, the Government's final witnesses at the trial, had each had at least eight years of experience as Treasury agents. (R. 1382a, 1428a, 1588a.) They testified as to the nature of the net worth method and summarized the results of their investigation, based upon documents in evidence and oral testimony in the record (R. 1389a–1394a, 1428a–1435a, 1454a–1488a, 1588a–1595a.) Agent Murphy testified in some detail as to the extent of the investigation, stating that it included a search of the public records for real estate transactions; circularization of 88 banks in the New York area for accounts and loans, as well

[1] The precise figures are tabulated in our Brief in Opposition to Certiorari, p. 4. The unreported income proved under Count I (1946) was minor.

as certain banks in Louisiana, Arkansas and Florida; analysis of bank deposits; circularization of 378 brokerage houses and fifteen insurance companies; investigation of possibilities that petitioner or his wife might have received inheritance or other non-taxable funds; and investigation into their expenditures (R. 1382a–1389a.) The search for evidence of non-taxable funds disclosed a small inheritance received by Mrs. Costello in 1945 and the receipt by petitioner of proceeds of life insurance policies, dividends on insurance policies, and income tax refunds, all of which were duly allowed in the Government's computations. (R. 1388a–1389a, 1394a, Ex. Vol. pp. 40, 51.)

The Government introduced 368 exhibits and called 144 witnesses. Of these, 103 gave testimony relating to specific expenditures made by petitioner or his wife during the prosecution years (Ex. Vol. pp. 46–48), almost all of them identifying some record or other document evidencing the transactions. Three of the other witnesses were the Treasury agents who had conducted the investigation (R. 1382a–1639a). The remaining thirty-eight witnesses testified either as to the authenticity of documents evidencing items of the net worth of petitioner and his wife or as to other miscellaneous pieces of circumstantial evi-

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The assets of petitioner and his wife consisted of cash in banks, investments in various enterprises, Government bonds, loans receivable, real estate, oil leases and miscellaneous other assets. (Ex. Vol. pp. 43–44.)

dence that went to make up the Government's case. There was no evidence of any specific items of unreported income from an identifiable source (R. 1395a–1396a), and the Government relied upon the inferences to be drawn from the net worth-expenditures computations plus other circumstances, from which wilfulness might be inferred. (R. 303a–307a, 310a, 318a, 587a, 595a–597a, 836a–842a, 923a, 989a–994a, 1003a–1008a, 1010a, 1015a–1018a, 1295a–1297a.)

At the close of the Government's case and at the close of all the evidence, the petitioner moved to dismiss the indictment on the ground that he had shown that there was no competent evidence before the grand jury (R. 1651a, 1782a–1783a). The trial court denied this motion, as well as motions to set aside the verdict and arrest the judgment on the same ground (R. 1876a, 1878a).

The Court of Appeals, per L. Hand, J., reversed the conviction on Count II for insufficiency of evidence and affirmed the conviction on Counts III and IV. With respect to the motions to dismiss, the court said that if "it appeared that no evidence had been offered [to the grand jury] that rationally established the facts" it would agree that the indictment should be quashed, but that that was not true in this case, even assuming that the only witnesses who testified before the grand jury were the Treasury agents. (Ex. Vol. p. 154.) Judge Frank con-

curred in a separate opinion. (Ex. Vol. pp. 157–159.)

SUMMARY OF ARGUMENT

A. The petitioner was indicted by a properly constituted grand jury and properly found guilty beyond a reasonable doubt by a petit jury. Valid on its face, the indictment is attacked here on the single ground that the grand jury acted only on the testimony of three Treasury agents, which, though admitted at the trial, was "hearsay" before the grand jury. It is not suggested that the grand jury acted on no evidence or on evidence unlawfully obtained. Nor is it claimed that the indictment represents an irresponsible or absurd judgment by a lay grand jury that an accusation was warranted. In the circumstances of this case, therefore, it may be unnecessary to decide, as a broad abstraction, whether an indictment based upon "hearsay" should be nullified. It may sufficiently answer petitioner that the evidence here was solid and reliable, if technically "incompetent," and that the grand jury's action was a reasonable determination. Nevertheless, we shall discuss the broader issue as it is posed in the question the Court has agreed to consider (*supra*, p. 2).

B. The Fifth Amendment, the sole basis for petitioner's claim, brought to American law a grand jury "possessed of the same powers that pertained to its British prototype * * *." *Blair*

v. *United States*, 250 U. S. 273, 282. It is of great significance, therefore, that petitioner's argument is squarely contrary to the common-law rules defining the grand jury's historic powers.

As it had evolved by the time of the American Revolution, the grand jury was a powerful, independent "instrument of *lay* inquiry into criminal wrongdoing * * *." *United States* v. *Johnson*, 319 U. S. 503, 512 (emphasis added). An indictment regular on its face, returned by a properly constituted grand jury, was not subject to re-examination for the sufficiency or competency of the evidence on which it was based. *E. g., Regina* v. *Russell*, 1 Car. & M. 139; *McGrain* v. *Daugherty*, 273 U. S. 135, 157. It is clear throughout the history of the English grand jury that arguments like the petitioner's were rarely attempted and never sustained.

C. American precedents are also substantially adverse to the petitioner.

1. In *Holt* v. *United States*, 218 U. S. 245, this Court rejected the contention that an indictment could be nullified because the grand jury received seriously damaging evidence which was "incompetent." While that decision is not squarely in point since it was not shown that there was no competent evidence before the grand jury, the opinion at least casts serious doubt on the petitioner's argument. Moreover, the Court has on

at least three occasions since *Holt* observed, though in other connections, that an indictment, regular on its face, concludes the issue of probable cause. *E. g., Ex parte United States*, 287 U. S. 241, 250.

The decisions of the lower federal courts are not more helpful to petitioner. From the adoption of the Fifth Amendment through the first decade of this century, following the English precedents on which the grand jury's powers rest, it was repeatedly held that such arguments as petitioner's could not prevail. Three trial court decisions departing to some extent from this otherwise firm principle are limited far more narrowly than would be the result petitioner seeks.

While a number of the federal courts have in dicta read this Court's *Holt* decision, mistakenly we think, to mean that an indictment based only on "incompetent" evidence could not stand, the pertinent holdings still remain adverse to petitioner. The Eighth Circuit, which had formerly adopted a seemingly contrary view, has agreed with the Second Circuit on the precise problem in this case, *i. e.* testimony by revenue agents before the grand jury. *Zacher* v. *United States*, 1955 C. C. H. Fed. Tax Rep., par. 9745, decided November 4, 1955. The Fifth Circuit has an earlier holding to the same effect. *Livezey* v. *United States*, 279 Fed. 496. It seems clear that

the uniform results reached by the Second, Fifth, and Eighth Circuits are correct and not opposed in any substantial sense to any other federal authority.

2. While state decisions on this subject are frequently affected by local statutes and practices, and thus are not helpful for consideration of the federal grand jury which "is part of the federal constitutional system" (*United States* v. *Johnson*, 319 U. S. 503, 513), it may be noted that the weight of authority in the states is against the petitioner. These decisions serve, moreover, to buttress our conclusion that the common-law principles underlying the Fifth Amendment sustain the decision below.

D. The application of trial rules of evidence to the lay, nonadversary deliberations of grand juries as a basis for invalidating indictments would introduce fruitless technicalities, promoting anomalous and inconsistent results, but not enhancing the right to be tried only on an indictment.

1. The hearsay rule finds its justification in the right of cross-examination. But hearsay evidence, as everyone knows, is a common and frequently reliable basis for the responsible judgments of laymen, and hearsay admitted at a criminal trial without objection may even be considered by a petit jury. In the proceedings of a grand jury, where there is no cross-examination

and no objections, the broad rule against hearsay has no place. If it did, any extensive use of hearsay or other incompetent evidence would, as at a trial, require setting aside an indictment. But this is certainly not the law. *Holt* v. *United States*, 218 U. S. 245, *supra*, p. 9. An "amorphous compromise" requiring *some* competent evidence to sustain an indictment would insist only upon an unprofitable technicality; the production of bits or even masses of "competent" evidence before this grand jury would not have illuminated its deliberations one whit.

2. As this case also illustrates, the long-entrenched secrecy of grand jury proceedings makes it a matter of accident whether a defendant will be able to show incompetency or insufficiency of the evidence on which the grand jury acted. If there is a right to nullify an indictment on such a basis, it would seem to entail a right to attempt the necessary showing. See VIII Wigmore, *Evidence* (3d ed.) § 2364. But it is clear that any wholesale invasion of the grand jury's proceedings to permit reexamination of the evidence on which it acted is not to be tolerated. *United States* v. *Johnson*, 319 U. S. 503, 513. The proposal that the showing should be allowed where fortuitous circumstances like those in this case permit it suggests an arbitrary and wholly unsatisfactory rule of constitutional law.

E. Finally, this case demonstrates the fallacy of any universal rule invalidating indictments

based on evidence technically "incompetent" as it was presented to the grand jury. To be sure, the Fifth Amendment seeks to insure care, reason, and responsibility in the serious business of criminal accusation. But, as our argument has attempted to show, application of the technical rules of evidence to the lay tribunal through which the Constitution seeks this result is not the way to achieve it. Here, the testimony of the Treasury agents, "made incompetent by circumstances" (*Holt* v. *United States*, *supra*, at 248) as it was presented to the grand jury, was actually competent and was received at the trial. It provided a solid basis for the judgment of the grand jury, which would have received little or no help if dozens of the witnesses who later appeared at the trial had been called to supply "some" competent evidence in the form of authenticating particular documents or testifying to specific expenditures of the petitioner. The few cases—in the Eighth and Fifth Circuits—which have considered this specific kind of problem are in agreement with the decision below, though the formal reasoning may vary somewhat. All are correct because in each instance the defendant was fully accorded the benefit of the substantial right to an indictment reasonably and honestly returned.

ARGUMENT

PETITIONER'S CONVICTION SHOULD NOT BE REVERSED ON THE GROUND THAT THE INDICTMENT MAY HAVE BEEN BASED SOLELY ON THE "HEARSAY" TESTIMONY OF TREASURY AGENTS, SUMMARIZING THEIR INVESTIGATION OF THE NUMEROUS TRANSACTIONS WHICH SHOWED NET WORTH INCREASES AND EXPENDITURES REVEALING UNREPORTED TAXABLE INCOME

A. INTRODUCTORY—THE NATURE OF THE ISSUE IN THIS CASE.

The petitioner was indicted by a duly constituted grand jury and found guilty beyond a reasonable doubt on the voluminous evidence presented to the petit jury. The sufficiency of the evidence on which he was convicted, the fairness of his trial, and the propriety of the trial court's rulings and instructions have been upheld on appeal.* The single question here is whether these proceedings must be nullified because the evidence the grand jury deemed sufficient to warrant the accusation against petitioner was apparently only the same, in substance, as the Treasury agents' testimony (R. 1382a–1639a) which was properly received at the trial but which, in its posture before the grand jury, would have been subject to objection as hearsay. And the testimony, it may be noted, "would have been subject to objection" only in the sense that the "hearsay" characterization would have been ac-

* Except for the evidence supporting the first of the three counts on which the jury convicted, the reversal of which is, of course, immaterial here.

cutate—not, of course, in the sense that such objections have any place before the *ex parte* "instrument of lay inquiry into criminal wrongdoing" which is the grand jury. *United States* v. *Johnson*, 319 U. S. 503, 512.

In defining the concrete issue before the Court, it is important to bear in mind the precise nature of the evidence which has been assumed for this case to have been all the grand jury had, and the reason why this evidence falls under the hearsay rubric. At the trial, the same testimony was admissible because it was preceded by the 141 witnesses who authenticated documents and testified to the specific transactions which in their totality served to demonstrate the net worth increases and expenditures revealing petitioner's unreported income. But it is clear, even without this foundation, that the testimony the agents gave before the grand jury was based upon their careful, responsible, and lawful investigation into petitioner's taxes. There is no question here of evidence before the grand jury illegally obtained by improper search, by unlawful compulsion, or even by disregard of any of the evidentiary privileges built on policies (*e. g.*, the promotion of marital harmony or of trust between priest and penitent or lawyer and client) which are valued highly enough to warrant restrictions on the search for truth in justice. Nor, certainly, is this a case where the grand jury acted on no evidence

at all or—what is nearly the same thing—on "hearsay" consisting of mere rumor or irresponsible gossip.

It may be unnecessary, therefore, for the purposes of this case to decide broadly whether an indictment based on "hearsay" alone is valid. See footnote 2, *supra*, p. 2. We shall show, nevertheless, that even on this level of generalization the petitioner must fail in his effort to set aside the indictment and the petit jury's verdict of guilty along with it. His argument would override the history and the values underlying the principle that the work of the grand jury—secret, non-adversary, and wholly different in character and purpose from the trial court and the petit jury for which the exclusionary rules of evidence have evolved—is not and never has been "circumscribed by the technical requirements governing the ascertainment of guilt once it has made the charges that culminate its inquiries." *United States* v. *Johnson*, *supra*, at 510. We shall show that petitioner's attempt to reach back from the trial court and retroactively intrude upon the grand jury's deliberations his technical objections to hearsay is sanctioned neither by precedent nor by contemporary good sense. We shall argue, finally, that assuming there could be a case for sustaining an effort like petitioner's to set aside an indictment and conviction because the grand jury

heard only hearsay; this is not the case. For this is not a case where a defendant has been called upon irresponsibly and unjustly to stand trial. On petitioner's showing alone, leaving aside the fact that a petit jury and two courts have adjudged his guilt, there was a solid basis for the grand jury's determination that he should be indicted. To dub that basis "hearsay", however properly under the rules of evidence, does not obscure the decisive fact that petitioner has had the full substance of his right under the Fifth Amendment to be tried only on the "indictment of a Grand Jury * * *."

B. THE ENGLISH BACKGROUND FROM WHICH INDICTMENT BY GRAND JURY DERIVES AFFORDS NO BASIS FOR PETITIONER'S POSITION.

There is no federal statute or rule to support petitioner's argument that an indictment is invalid and a subsequent conviction must be reversed if the grand jury acted on evidence which would be excludable at a trial as hearsay.[7] Recognizing this, petitioner rests his case entirely upon the Fifth Amendment. It is instructive, therefore, to recall briefly the familiar history of the English grand jury, since the Fifth Amendment continued "such a jury * * * possessed of

[7] Compare the state cases cited by petitioner (Br. 13) and mentioned again below (p. 46), where statutes are held to require the result petitioner seeks to achieve in this case without a statute. Cf. *Hale* v. *Henkel*, 201 U. S. 43, 64; *United States* v. *Thompson*, 251 U. S. 407, 416.

the same powers that pertained to its British prototype * * *." *Blair* v. *United States*, 250 U. S. 273, 282; *Hale* v. *Henkel*, 201 U. S. 43, 59–66. And it is surely of the greatest significance that neither the petitioner nor we have found a single case in all of English history, down to England's abolition of the grand jury in 1933,* where a court went behind an indictment to quash or to reverse a conviction for insufficiency or incompetency of the evidence on which the grand jury acted. Not only this fact but the whole body of English learning on the subject, in what it says and leaves unsaid, argues contrary to petitioner's proposal to read the hearsay rule into the grand jury provision of the Fifth Amendment.

As this Court has observed, the early ancestors of our grand jurors, apparently dating from Henry II's Assize of Clarendon in 1164, "heard no witnesses in support of the truth of the charges to be preferred, but presented upon their own knowledge, or indicted upon common fame and general suspicion * * *." *Hurtado* v. *California*, 110 U. S. 516, 530; and see 1 Pollock & Maitland, *History of English Law* (1895) 131; 2 *id.* 639, 640–641. These original jurors served both as witnesses and accusers, giving voice to the "common repute" abroad in their community, subject

* 23 & 24 Geo. 5, c. 36; 5 Halsbury's *Statutes of England* (2d ed., 1948), pp. 1065–1073.

to questioning by the traveling justices and to punishment for failure to make presentments of suspected wrongs. 2 *id.* 639, 643–644.

To be sure, as petitioner observes (Br. 4), the developing grand jury changed over the centuries from an informed echo of local opinion and suspicion to the inquisitorial institution we know today. It is undoubtedly true that by the time of the American Revolution grand juries were hearing witnesses and ordinarily returning indictments as a result of inquiry rather than merely on knowledge brought by the jurors to the deliberations. See, *e. g.*, 4 Blackstone, *Commentaries* (Chitty, 1866) p. *302 *et seq.*; 1 Holdsworth, *History of English Law*, p. 322. But the evolutionary picture of which this was one aspect gives no support to petitioner's argument. For the practice of hearing witnesses grew along with, and as part of, the development which saw the grand jury acquire the independence, the secrecy, and the lay control we know today. Freed from the direct supervision of both the king and his justices, no longer answerable either for indicting or for failing to indict, the grand jury acquired new powers, not new restrictions. Thus, Holdsworth, writing in 1931, could say (1 *History of English Law*, pp. 322–3):

> The grand jury of modern times still retains some traces of antiquity which have been lost to the other varieties of the jury.

> They consider the evidence in secret, and the court does not control or advise them as to their findings in the individual cases which come before them. It merely charges them generally as to the nature of the business which they are about to consider. They can always act if they please on their own knowledge; and Holt tells us that they often so acted at the end of the seventeenth century. They can act at the present day in much the same way as they acted in the thirteenth century.

Reflecting this autonomous power of lay inquiry and accusation, there appears never to have been any doubt that an indictment, regular on its face and returned by a duly constituted grand jury, was conclusive on the issue of probable cause. See *Regina* v. *Russell*, 1 Car. & M. 139 (1842);[9] *Regina* v. *Bullard*, 12 Cox 353 (1872); *The King and Wakeford*, 1 Barn. K. B. 47, 94 Eng. Rep. 33 (1728); and see *Ex parte United States*, 287 U. S. 241, 250; *Ewing* v. *Mytinger & Casselberry*, 339 U. S. 594, 599. Indeed, the impropriety of going behind an indictment to consider the evidence on which the grand jury acted was apparently so well recognized that it is reflected mainly by the absence of litigation or discussion. Thus, Mr. Justice Nelson, on circuit in 1852, observed

[9] Cited with approval in *McGrain* v. *Daugherty*, 273 U. S. 135, 157, fn. 11.

(*United States* v. *Reed*, 27 Fed. Cas. No. 16,134, at p. 738 (C. C. N. D. N. Y.)):

> No case has been cited, nor have we been able to find any, furnishing an authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof, or whether there was a deficiency in respect to any part of the complaint * * *.

Similarly, the works of eminent English writers—in their treatment of motions to quash and pleas in abatement, as elsewhere—are devoid of authority for petitioner's claim that an indictment may be nullified because of the insufficiency or impropriety of the evidence before the grand jury. See, *e. g.*, 2 Hawkins, *Pleas of the Crown*, 327–329, 363–368, 522–523; 2 Hale, *Pleas of the Crown* (Stokes & Ingersoll, 1847), 235–239; 4 Blackstone, *Commentaries* (Chitty, 1866) 269–273. There are, it is true, occasional observations to the effect that since the accused has no chance to present evidence to the grand jury, the "proof of the offence should be substantial" (2 Hawkins, *Pleas of the Crown*, 367), and that a "grand jury * * * ought to be thoroughly persuaded of the truth of an indictment, so far as their evidence goes; and not rest satisfied merely with remote probabilities: a doctrine that might be applied to very oppressive purposes." 4 Blackstone, *Commentaries* (Chitty, 1866), 247. And see 1 Chitty, *Criminal Law* (1847 Ed.) 318–319. But such com-

mentaries seem to have been only in the nature of advice (see *State* v. *Boyd*, 2 Hill (S. C.) 288 (1834)), and did not go to the question of the grand jury's power. At least, there is no evidence that a failure to heed the advice would be inquired into for the purpose of quashing an indictment or reversing a conviction.

As we have noted, petitioner cites no case in English history among the British authorities he invokes (Br. 16–17) which reaches the result he seeks here. Thus, he first cites *Denby's Case*, 1 Leach 514, 168 Eng. Rep. 359 (1789), and the similar Canadian decision in *Reg.* v. *Carbray*, 13 Quebec L. R. 100 (1887), where courts refused to supply depositions in their files for the grand jury's examination. These cases, obviously not involving proposed inquiries into the evidence underlying an indictment already returned, reflect merely a readily understandable reluctance on the part of at least some judges to *send* affidavits to a grand jury as substitutes for live witnesses. Even on this far different point, there is a division of authority, with other English courts acquiescing in grand jury requests for incompetent evidence. See *Reg.* v. *Gerrans*, 13 Cox 158 (1876), and *Reg.* v. *Bullard*, 12 Cox 353 (1872), in the latter of which, granting a grand jury's request for the deposition of an absent witness "without whose evidence they had no materials to find a bill", Judge Byles stated (p. 353)

> that the Grand Jury were not bound by any rules of evidence. They were a secret tribunal, and might lay by the heels in jail the most powerful man in the country by finding a bill against him, and for that purpose might even read a paragraph from a newspaper.

Whether or not to endorse this statement, or whether a court should provide incompetent evidence for a grand jury, is of course not the question here. Our point is simply that the answers to such questions cannot aid the petitioner in justifying the extreme position for which he argues.

Petitioner's subsequent citations of British authority leave wholly unimpaired our conclusion that English history and precedent are opposed to his contention.[10] Indeed, we have discovered

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[10] *The King* v. *Willett*, 6 T. R. 294, 101 Eng. Rep. 560 (1795), observed by way of dictum that a grand jury should hear live witnesses and not merely read affidavits in order to return a proper indictment. The case was concerned, however, with the wholly different problem of the evidence required for a judicial information. The court had no indictment or proposed indictment before it and was, of course, not confronted with any question whether it should go behind an indictment to quash or reverse a conviction upon an examination of the evidence before the grand jury. *Keenan* v. *Boylan*, 1 Sch. & Lef. 232 (Ireland, 1803), granted a grand jury's request to see an affidavit in which it wished to consider a charge of perjury. The court made its observation that a grand jury is "bound as much as the petit jury to find on legal evidence" (p. 233) merely in connection with its determination that the grand jury should have the original

only one English case, not cited by the petitioner, where an argument like the one here was even attempted, and then without success. This is the case of *The King* v. *Dr. Dodd*, 1 Leach 155, the

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affidavit rather than a copy. Of particular interest in the instant case is the fact that, strictly speaking, the affidavit would have required authentication by its custodian to be admitted at a trial, but this did not deter the court. *Rex* v. *Dickinson*, Russ. & Ry. 401, 168 Eng. Rep. 866 (1819), cast doubt on an indictment where witnesses were not sworn. But this was a matter which would have appeared on the court's records, and would thus not require extrinsic inquiry, since grand jury witnesses were at the time sworn in open court. 5 Halsbury's *Statutes of England*, 720–721. And even this statement of doubt was not followed in the later case of *Reg.* v. *Russell*, 1 Car. & M. 139 (1842), where it was held that a failure to swear the witnesses properly would not vitiate an indictment, "as the grand jury were at liberty to find a bill upon their own knowledge merely, and were anciently in the habit of doing so." In *The King* v. *Thurstan*, 16 B. C. R. 326, 20 Can. Crim. Cas. 505 (1911), the *nisi prius* judge had returned an indictment to a grand jury which had heard no witnesses but only read depositions. The grand jury returned a new indictment, and the only question before the appellate court was the validity of this second indictment, which was upheld. Finally, as petitioner states (Br. 16–17), *Belanger* v. *The King*, Quebec Rep., 12 K. B. 69 (1902), contains dicta favorable to his position.

It is to be observed that in all this train of British authority only two Canadian cases in the present century contain indications favorable to the result for which petitioner contends. Whatever persuasiveness they may carry, these are hardly significant in determining the state of the English law carried into the Fifth Amendment. And the critical point remains that, except for the *nisi prius* ruling in *The King* v. *Thurstan*, *supra*, on the obviously different situation where the grand jury heard no witnesses at all, there is not a square holding in the lot to support the petitioner.

arguments and trial of which are reported at 18 *Old Bailey Trials,* Feb. 1777 Sessions, pp. 94–118.[11] There, the defendant and one Lewis Robertson had been committed to jail as principals on a forgery charge. Before indictment the prosecution had illegally obtained an order from the clerk of the court directing the jailer to take Robertson before the grand jury to give evidence against Dodd. By virtue of the order, Robertson was examined by the grand jury and an indictment was returned against Dodd alone, with Robertson's name, among others, endorsed on the back as a witness. Two days later the court declared that the order had been surreptitiously obtained and was therefore unlawful and void. Dodd contended that because Robertson had been legally committed as a principal in the same offense and had been examined by the grand jury through an illegal order, the indictment was defective on its face,[12] as having been found upon

[11] This volume, which we were unable to find in Washington, was loaned to us by Harvard University. For the convenience of the Court and opposing counsel, we are filing and serving photostats of the pertinent pages.

[12] Acknowledging the inviolable secrecy of the grand jury's proceedings, counsel for Dodd urged that the defect appeared on the face of the indictment in that (1) the names of Robertson and Dodd appeared side by side in the indictment as witnesses to the forged signature; (2) Robertson's name was endorsed upon the back of the indictment as a witness; and (3) the records of the court disclosed that Robertson was committed as a principal in the same offense and was taken from jail to the grand jury on the basis of an illegal order. 18 *Old Bailey Trials*, *supra*, at 94–96, 107.

improper evidence, and that he ought not to be compelled to plead to it.

Responding to this contention in terms which we think correctly reflected English law, both then (at the time of the American Revolution) and thereafter, Sir James Mansfield, Solicitor General, said (18 *Old Bailey Trials, supra,* at 103):

> Although twenty witnesses appear upon the back of an indictment, if one witness satisfies the Grand Jury that the man ought to be tried, they often proceed no further in examining witnesses; whether either of them proved enough to warrant the bill, it is impossible for the Court to say; * * * the form of business is, the witnesses are sworn, and their names are put upon the indictment before they go in to the Grand Jury, the Grand Jury then call the names appearing upon the indictment; they don't often examine them all; they examine as many as they think proper, and it is impossible for your lordships to say, that the Grand Jury founded the indictment upon this, or that man's evidence, or to know whether they had a legal authority for finding the bill; therefore I trust your lordships will be of opinion that this trial is to go on, recollecting that this is admitted to be the first attempt of the sort that ever was made for rejecting a bill upon a supposed knowledge of what passed before the Grand Jury, and I submit to your lordships that it is entirely without authority.

The court saved the point for the appellate judges and permitted the trial to go forward, whereupon Dodd was convicted. In May 1777, speaking for The Twelve Judges, Mr. Justice Aston delivered the following opinion (1 Leach at 156–157):

> The Judges have met, and have fully considered the whole matter of this objection; and they are unanimously of opinion, that the necessity of some proper authority to carry a witness, who happens to be in custody, before the Grand Jury to give evidence, regards the justification of the Gaoler only; but that no objection lies upon that account in the mouth of the party indicted; for in respect to him, the finding of the bill is right and according to law.
>
> Whether a private prosecutor, by using an accomplice in or out of custody as a witness, gives such a witness a plea not to be prosecuted * * *, or can entitle the prosecutor himself to have his recognizance discharged, is a matter very fit for consideration, under all the circumstances of the particular case whenever that question shall arise; but it is a matter in which the party indicted has no concern, nor can he make any legal objection to the producing such a person as a witness; for the accomplice is, against him, a legal and a competent witness; and so was Lewis Robertson upon the bill of indictment found upon this occasion.

> The Judges therefore are of opinion, That the proceedings upon that indictment were legal, and that the prisoner was convicted according to law.[13]

It has been suggested, apparently because of the observation that Robertson was "a legal and a competent witness", that the opinion indicates that the result would have been different had the witness not been "legal and competent."[14] But there are several answers to this suggestion. In the first place, it is to be noted that both parties correctly assumed that the alleged defect would not be considered at all but for its appearance on the face of the indictment. Furthermore, while the evidence of such a witness would have been admissible at the trial (as was the hearsay petitioner attacks in this case), it was clear that it was unlawful as it was presented to the grand jury. Thus, it is not surprising to-

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[13] Dodd was sentenced to death and executed. *Id.* at 157.

[14] In *United States* v. *Farrington*, 5 Fed. 343, 348 (N. D. N. Y.), the court cited the *Dodd* case as a "respectable authority" which "intimate[d] that an indictment should be quashed when it appears that it was found by the grand jury without adequate evidence to support it, or when the grand jury permitted the rules of evidence to be violated * * *." In the same sentence, however, the court recoiled from the supposed intimation, adding, "but if this were permitted it would result that the court would become the tribunal to indict as well as the tribunal to try the accused." See pp. 39–41, *infra*. As we show in the text, the intimation, if it was one, never became anything more in the English courts.

learn from 2 Hawkins, *Pleas of the Crown* (1787), p. 367, that in *Dodd's* case—

> many of the judges were inclined to think, that if a grand jury should find a bill upon evidence *palpably improper*, and the party be afterwards convicted on it by *lawful evidence*, before the petty jury, the validity of such a conviction could not be impeached. [Emphasis in original.]

In short, the case is correctly described in a note to 2 Hale, *Pleas of the Crown* (Stokes & Ingersoll, 1847), p. 157, as standing simply for the proposition "that it did not lie in the mouth of the prisoner to object to the proceedings of the grand jury as informal and the evidence as improperly given them." See, also, *State* v. *Fasset*, 16 Conn. 457, 473 (1844). And this conclusion squares with the fact which is critical here—that there is no case or discussion of English law supporting petitioner's position.

Insofar as English law through the eighteenth century (as well as thereafter) is highly pertinent in construing the indictment provision of the Fifth Amendment (see *Hale* v. *Henkel*, 201 U. S. 43, 59–65; *Blair* v. *United States*, 250 U. S. 273, 282; cf. *Frisbie* v. *United States*, 157 U. S. 160, 163; *United States* v. *Thompson*, 251 U. S. 407), it may be taken as a virtual certainty that the framers of the Amendment never understood it to mean a defendant could avoid trial or undo his

conviction by convincing the court that the grand jury had indicted on insufficient or incompetent evidence. We submit that Judge Learned Hand was right in 1910, as he is today; when he said (*In re Kittle*, 180 Fed. 946, 947 (C. C. S. D. N. Y.)):

> * * * [Grand jurors] are the voice of the community accusing its members, and the only protection from such accusation is in the conscience of that tribunal. Therefore, except in sporadic and ill-considered instances, the courts have never taken supervision over what evidence shall come before them, and, with certain not very well-defined exceptions, they remain what the Grand Assize originally was, and what the petit jury has ceased to be, an irresponsible utterance of the community at large, answerable only to the general body of citizens, from whom they come at random, and with whom they are again at once merged. A court shows no punctilious respect for the *Constitution in regulating their conduct*. We took the institution as we found it in our English inheritance, and he best serves the Constitution who most faithfully follows its historical significance * * *.

As we undertake to show elsewhere in this brief, the arguments against petitioner are by no means only historical. Even as an original matter, his arguments seem fallacious to us in terms of a logical and rational administration of criminal justice. Nevertheless, the teachings of history

are of great weight here. These reveal the grand jury provided for in the Fifth Amendment as a powerful, secret, largely uncontrolled body of lay accusers, acting on the commonsense judgments of responsible citizens. The proposed power of judicial revision through examinations to test the grand jury's compliance with the hearsay rule would effect an unwarranted intrusion, foreign and damaging to the lay control sanctioned by tradition and experience.

C. THERE IS NO SUBSTANTIAL BASIS IN THE HOLDINGS OF AMERICAN COURTS FOR PETITIONER'S CONTENTION

1. *The federal precedents.*—As the court below noted (Ex. Vol. p. 157), there is no decision of this Court dealing directly with the question presented here. In 1910, however, in *Holt* v. *United States*, 218 U. S. 245, the Court passed upon the closely related contention that a defendant should have been permitted to show by plea in abatement and motion to quash that certain admissions he had made, incompetent by reason of the circumstances under which they were obtained, had been put before the grand jury, and that there was very little other evidence against him. In a unanimous opinion by Mr. Justice Holmes, the Court said (pp. 247–248):

> Without considering how far, if at all, the court is warranted in inquiring into the nature of the evidence on which a grand jury has acted, and how far, in case of

> such an inquiry, the discretion of the trial court is subject to review, *United States* v. *Rosenburgh*, 7 Wall. 580, it is enough to say that there is no reason for reviewing it here. All that the affidavit disclosed was that evidence in its nature competent, but made incompetent by circumstances, had been considered along with the rest. The abuses of criminal practice would be enhanced if indictments could be upset on such a ground. *McGregor* v. *United States*, 134 Fed. Rep. 187, 192, 430. *Radford* v. *United States*, 129 Fed. Rep. 49, 51. *Chadwick* v. *United States*, 141 Fed. Rep. 225, 235.

While it is not squarely in point, that holding and the terms in which it was couched seem to us to weigh heavily against the petitioner. There, evidence of the most damaging kind, "made incompetent by circumstances" (as may well be said here of the "hearsay" evidence which was competent in the circumstances of the trial), was considered by the grand jury. Realistically, there is little basis to suppose that this evidence did not underlie to some substantial extent the grand jury's decision to return an indictment. It would be difficult to reconcile with this result a holding that, without some admixture of competent evidence, the grand jury's action may be nullified. See pp. 51–52, 55–57, *infra*.

Later statements of this Court, approving the principle which seems to have controlled under the

English law adopted in the Fifth Amendment, are flatly adverse to petitioner's proposal that the adequacy of the evidence on which the grand jury acted should be reexamined. Thus, though illustrating a point different from the one here, this Court has declared "that grand jurors, acting under the sanction of their oaths as such, may find and return indictments based solely on their own knowledge of the particular offenses, and that warrants may be issued on such indictments without further oath or affirmation * * *." *McGrain* v. *Daugherty*, 273 U. S. 135, 157. Again, in *Ex parte United States*, 287 U. S. 241, 250, the Court declared it to be beyond doubt "that, in the court to which the indictment is returned, the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause for the purpose of holding the accused to answer." See, to the same effect, *Ewing* v. *Mytinger & Casselberry*, 339 U. S. 594, 599.[15]

Turning from the *Holt* decision and the later pronouncements of this Court to the other federal precedents, we submit that these afford petitioner

[15] And see *Beavers* v. *Henkel*, 194 U. S. 73, 85, 88. In their notes on Rule 40, Fed. R. Crim. P., the Advisory Committee, following *Beavers* v. *Henkel*, said: "Since the action of the grand jury is not subject to review by a district judge in the district in which the grand jury sits, it seems illogical to permit such review collaterally in a removal proceeding by a judge in another district."

scant bits of assistance, and in the final balance weigh clearly against him.

a. Petitioner begins his review of the federal authorities (Br. 7) with a charge of Mr. Justice Field, on circuit to a California grand jury in 1872 (*Charge to Grand Jury*, 30 Fed. Cas. No. 18,255, at p. 993):

> In your investigations you will receive only legal evidence, to the exclusion of mere reports, suspicions, and hearsay evidence.

Describing this as the "prevailing view," petitioner presents it as supposed authority for the reversal of his conviction.

To begin with, however, there is a world of difference between instructing or advising the grand jury against the receipt of incompetent evidence and going behind an indictment to set aside the grand jury's action if the advice was not followed. See *State* v. *Boyd*, 2 Hill (S. C.) 288, 289 (1834). Whatever might be required by *a priori* considerations of pure logic, there is no real inconsistency, when the respective provinces of court and grand jury are borne in mind, between giving a charge like the one quoted and refusing to countenance an argument like the petitioner's.[16] So, for example, the American Law

[16] Compare the discussion earlier (pp. 22–23, *supra*) of cases where courts have refused to send incompetent evidence to a grand jury. *United States* v. *Bolles*, 209 Fed. 682 (W. D. Mo.), is such a case.

Institute, in Section 138 of its 1930 draft of a Code of Criminal Procedure, provided:

> The grand jurors shall find an indictment only where they have received what they believe to be sufficient legal evidence and in case of doubt they may ask the advice of the prosecuting attorney; but no indictment shall be quashed or judgment of conviction reversed on the ground that there was not sufficient legal evidence.

It is apparent, moreover, that even on the question of how a grand jury should be instructed, Mr. Justice Field's charge never represented a "prevailing view." Referring to this charge, Judge Learned Hand, we think correctly, described it as a "variant" which "has never taken root and may be disregarded." *United States* v. *Remington*, 208 F. 2d 567, 574 (C. A. 2) (dissenting opinion). And it is to be noted that of the thirty-two grand jury charges collected in 30 Fed. Cas. Nos. 18,246 to 18,277 (pp. 976–1051) very few refer at all to the kind of evidence the grand jury ought to receive or consider, the majority leaving this to the lay discretion of the jurors. Some speak merely of "good sense" as the guide (No. 18,248 (C. C. D. W. Va.), p. 980) or of the duty to make presentments on "reasonable prima facie proof" (No. 18,247 (C. C. S. D. N. Y.), p. 980). One, of particular interest here, says this (No. 18,251 (D. Ore.), p. 986):

> In respect to the manner and extent of your inquiries, your own good sense will

> be your best guide. You ought only to act upon legal evidence, or *what satisfies you that the legal evidence exists.* * * * If you have any reason to believe that any officers of the government possess information proper for your action, you should summon them before you, and examine them thoroughly. *Officers connected with the assessment and collection of internal revenue may with special propriety be thus examined.* [Emphasis added.]

It is to be noted, finally, that the language of Justice Field's charge substantially paraphrased language he had previously used, as Chief Justice of the Supreme Court of California, in interpreting that state's particular statutes on the subject. *People* v. *Tinder,* 19 Cal. 539; 542–543 (1862).[17] Insofar as it reflects this state influence, the weight of the language as federal authority is further diminished. Cf. *United States* v. *Thompson,* 251 U. S. 407, 416; *United States* v. *Johnson,* 319 U. S. 503, 513. But the decisive point for this case remains the one already mentioned—that the prescriptions in a grand jury charge cannot be read as the terms on which a court is free to nullify an indictment. This becomes apparent when we turn from grand

[17] These statutes, set out in the case cited, were largely identical with the present California statutes, to which petitioner refers in his Appendix A (Br. 25).

jury charges to cases where a claim like the petitioner's has been considered.

b. In the perspective of time, it seems apparent that the English principles embodied in the Fifth Amendment were substantially unquestioned for a considerable period after its adoption. The first federal case in which an indictment was attacked on the ground that it rested on illegal evidence appears to be *United States* v. *Smith*, 27 Fed. Cas. No. 16,341a (C. C. D. N. Y., 1806), where the point was raised by a plea in abatement. Opposing the plea, the district attorney argued (p. 1187) that it "was a perfectly novel experiment, for which no precedent or authority could be found. This very novelty was conclusive evidence that it would not lie; for otherwise it is inconceivable that it should not have been made use of before now." The plea and a subsequent motion to quash were denied without opinion.

In 1852, in a case from which we have quoted (*supra*, p. 21), Mr. Justice Nelson rejected a similar contention in a detailed opinion, again remarking the lack of "authority for looking into and revising the judgment of the grand jury upon the evidence," and detailing the unhappy consequences for grand jury proceedings which would result from embarking on such a course. *United States* v. *Reed*, 27 Fed. Cas. No. 16,134 (C. C. N. D. N. Y.), p. 738. Similarly, in 1871, in

United States v. *Brown*, 24 Fed. Cas. No. 14,671 (D. Ore.), it was said (p. 1274):

> Neither the motion to set aside nor the motion to quash will lie where the objection does not appear or arise upon the face of the indictment, or perhaps the records of the court. This being so, the affidavits of the defendants impugning the conduct and judgment of the grand jury, cannot be considered upon the hearing of this motion. If the contrary practice were established, there would be no need of grand juries, and the court would necessarily assume both the function of indicting and trying criminals; for it is safe to presume that in most cases the defendant would object to being tried upon the indictment, and support such objection by his affidavit that he believed the grand jury acted upon incompetent or insufficient evidence. The wit of man could not devise a mode of indicting which would not be liable to this objection from the defendant. In the administration of criminal justice, confidence must be reposed somewhere; and it must be admitted that there are few bodies concerned in it, that may be more safely trusted than the grand juries of this district.

These rulings, following the guidance of the precedents which underlay the Fifth Amendment, represented the plain tenor of federal authority at least through the first decade of the present

century. See, also, *United States* v. *Terry*, 39 Fed. 355, 356–357 (N. D. Cal., 1889); *United States* v. *Cobban*, 127 Fed. 713, 718–721 (C. C. D. Mont., 1904); *United States* v. *Violon*, 173 Fed. 501 (C. C. S. D. N. Y., 1909). Against them, only three cases throughout this period are even remotely helpful to petitioner, and none of them stands for the result he seeks in this case.

First, in *United States* v. *Coolidge*, 25 Fed. Cas. No. 14,858 (C. C. D. Mass., 1815), not cited by petitioner, in a brief opinion where the legal issue does not appear to have been debated, an indictment was quashed on the ground that one of the witnesses before the grand jury, opposed to taking an oath, had not been sworn. While the result is questionable, and has not been followed (see *State* v. *Dayton*, 23 N. J. L. 49, 57–58; *State* v. *Boyd*, 2 Hill (S. C.) 288, 289), it is enough that it is clearly distinguishable from this case. It appears from the opinion that the Massachusetts practice, which was evidently followed by the federal court, was to have the witnesses sworn by a court officer prior to going before the grand jury. Thus, the court's insistence upon regularity in this respect was less an intrusion upon the grand jury's powers than a matter of controlling the court's own officers. Compare fn. 10, *supra*, at p. 24.

A second federal case in the nineteenth century which looks in the direction of petitioner's argu-

ment is *United States* v. *Farrington*, 5 Fed. 343 (N. D. N. Y., 1881) (Pet. Br. 9), really the first federal case quashing an indictment strictly for matters occurring before the grand jury. There, however, a combination of prejudicial circumstances, wholly unlike the ones here, formed the basis for that sharply limited decision. The court found it to be "patent that the grand jury permitted themselves to be influenced by the appeals and arguments of a zealous advocate [a private attorney for parties injured by the alleged offense], by hearsay testimony, and by testimony which the law prohibits, although they were advised to the contrary by the district attorney" (p. 347). Thus influenced, the grand jurors did not even have read or explained to them the voluminous indictments (prepared by the private attorney) they returned in haste (p. 344). The court limited its decision to such "extreme cases, when the court can see that the finding of a grand jury is based upon such utterly insufficient evidence, or such palpably incompetent evidence, as to indicate that the indictment resulted from prejudice, or was found in wilful disregard of the rights of the accused" (p. 348). Emphasizing this narrow restriction, the court cautioned (*ibid.*) that if it were permissible more generally to quash indictments for insufficient or incompetent evidence, "it would result that the court would become the tribunal to indict as well as the

tribunal to try the accused." See fn. 14 *supra*, p. 28.

Finally, petitioner invokes from the nineteenth century (Br. 10, 11) the decision in *United States* v. *Kilpatrick*, 16 Fed. 765 (W. D. N. C., 1883). There, however, although the court made the dubious observation (p. 771) that grand jury investigations "must be made in accordance with the well-established rules of evidence," the indictment was quashed primarily because of the conduct of a Department of Justice attorney who assisted the district attorney in the presentation without the court's permission. The case was avowedly decided upon the law of North Carolina (see p. 767), and the court relied heavily (pp. 769–770) upon *Lewis* v. *Board of Commissioners*, 74 N. C. 194. Some years later, cutting the ground from under the decision, this Court said (*Hale* v. *Henkel*, *supra*, 201 U. S. at 64):

> In *Lewis* v. *Board of Commissioners*, * * * it was * * * said that none but witnesses have any business before the grand jury, and that the solicitor may not be present, even to examine them. The practice in this particular in the Federal courts has been quite the contrary.

c. We have confined the discussion in the preceding section to federal cases before 1910, because this Court's decision in that year in *Holt* v. *United States*, 218 U. S. 245, *supra*, pp. 31–32, has led to some subsequent observations which we

believe to have been mistaken in suggesting departures from the fairly clear principles which had theretofore prevailed. Despite these suggestions, the balance of authority has not significantly improved for the petitioner since *Holt* was decided.

In several cases, *Holt* was cited for the proposition, sufficient to that decision, that an indictment must be upheld so long as there was *some* competent evidence before the grand jury. *Hillman* v. *United States*, 192 Fed. 264, 268–269 (C. A. 9), certiorari denied, 225 U. S. 699; *Anderson* v. *United States*, 273 Fed. 20, 29 (C. A. 8), certiorari denied, 257 U. S. 647; *United States* v. *Perlman*, 247 Fed. 158, 162 (S. D. N. Y.). Then—despite the opposite intimations in *Holt* (*supra*, pp. 31–32), contrary to this Court's repeated observations that an indictment is conclusive on the question of probable cause (*supra*, pp. 32–33), and largely without support in logic or precedent—a number of courts took the further step of stating that an indictment would be invalid if it were shown that there was *no* competent evidence before the grand jury. *Nanfito* v. *United States*, 20 F. 2d 376, 378 (C. A. 8); *Brady* v. *United States*, 24 F. 2d 405 (C. A. 8). See *Murdick* v. *United States*, 15 F. 2d 965, 967 (C. A. 8), certiorari denied *sub nom. Clarey* v. *United States*, 274 U. S. 752; *Czarlinsky* v. *United States*, 54 F. 2d 889 (C. A. 10), certiorari denied, 285 U. S.

549; *Gates* v. *United States*, 122 F. 2d 571, 576 (C. A. 10), certiorari denied, 314 U. S. 698; cf. *Olmstead* v. *United States*, 19 F. 2d 842, 845 (C. A. 9), affirmed on other grounds, 277 U. S. 438; *United States ex rel. Potts* v. *Rabb*, 141 F. 2d 45, 47 (C. A. 3).[18]

Among these lower court pronouncements, however, only the two Eighth Circuit decisions—*Nanfito* v. *United States* and *Brady* v. *United States*—were actual holdings. And these decisions are wholly divested of any support they might have afforded petitioner by the more recent decisions of the same court in *Banks* v. *United States*, 204 F. 2d 666,[19] and *Zacher* v. *United States*, 1955 C. C. H. Fed. Tax Rep., par. 9745, decided November 4, 1955. Both of these, like the instant case, involved the question whether the testimony of Treasury agents charged with investigation was sufficient to uphold an indictment for attempted tax evasion. In both, observing that the agents had later given proper testimony before the petit jury, the court found

[18] In *Duarte* v. *United States*, 171 F. 2d 971 (C. A. 5), and *Cox* v. *Vaught*, 52 F. 2d 562 (C. A. 10), relied upon by petitioner, the courts indicated that an indictment should be quashed only if it is established that it was returned upon no evidence whatsoever.

[19] Certiorari denied, 346 U. S. 857, order vacated, 347 U. S. 1007, judgment vacated and case remanded, 348 U. S. 905, reaffirmed, 223 F. 2d 884, pending on petition for certiorari, No. 337, this Term.

the grand jury testimony sufficiently "competent" to sustain the indictment. While the terms of these holdings are theoretically different in their characterization of the evidence as competent, it is clear that they are in fact indistinguishable from the present case.[20] Indeed, in the *Zacher* decision, rendered after the decision below in this case, the Eighth Circuit left no room to doubt its entire agreement in substance with the result here. It said (1955 C. C. H., *supra*, p. 56,058):

> Defendant also moved to dismiss the indictment on the ground that it was based on hearsay and opinion testimony of a Government investigator, and that there was no competent or legal evidence before the grand jury to establish the essential elements of the indictment. The defendant relies on *Nanfito* v. *United States*, 8 Cir., 20 Fed. (2d) 376, and *Brady* v. *United States*, 8 Cir., 24 Fed. (2d) 405, wherein it is stated that an indictment should be quashed if there is no competent evidence of the offense charged presented to the grand jury. In *United States* v. *Costello*, 221 Fed. (2d) 668, 677 [55-1 USTC par. 9342], certiorari granted, October 10, 1955,

[20] Petitioner attempts (Br. 12) to distinguish the *Banks* and *Zacher* cases on the ground that there the defendants had made certain admissions to the agents, and they were therefore able to provide the grand jury with some "competent" evidence. It will be noted, however, that in neither case did the court rely upon any such circumstances or make any mention of them.

> the second circuit considers the rule stated in the *Brady* and *Nanfito* cases, and states that, if "incompetent" includes all evidence that may be excluded at the trial, it feels that the rule of the *Brady* case is too narrow. We are not here confronted with the necessity of determining just what is included in the term "incompetent evidence." We feel the evidence here offered fully met the test of the *Brady* case. Even if it be true that agent Hanley was the only witness before the grand jury, the same witness appeared at the trial and offered substantial evidence which was admitted. Presumably he covered the same field before the grand jury.

In sum, even on the probably unduly broad question whether "incompetent" evidence alone can sustain an indictment, there are almost no federal holdings supporting the petitioner.[21] Narrowing to the more concrete problem of this case, such holdings as these are sustain the Govern-

[21] We have discussed four such decisions which can be said to any degree to favor the petitioner, noting the important factual distinctions in each: *United States* v. *Farrington*, *supra*, pp. 39–41; *United States* v. *Kilpatrick*, *supra*, p. 41; *Nanfito* v. *United States*, *supra*, pp. 42, 43; *Brady* v. *United States*, 24 F. 2d 405, *supra*, pp. 42, 43. To these should be added *United States* v. *Rubin*, 218 Fed. 245 (D. Colo., 1914), where, as one of three grounds for quashing an indictment, the court referred to the fact that the grand jury had received hearsay evidence. There was no showing of an absence of competent evidence, however, and the court wholly overlooked this Court's decision four years earlier in *Holt* v. *United States*, *supra*.

ment. This is true in the Eighth and Second Circuits, and also in the Fifth, where a similar decision was reached in *Livezey* v. *United States*, 279 Fed. 496. The federal precedents since the adoption of the Fifth Amendment, as well as those of the common law on which the Amendment was founded, support affirmance of the judgment below.

2. *The state cases.*—Since the federal grand jury, "unlike the situation in many states, is part of the federal constitutional system" (*United States* v. *Johnson*, 319 U. S. 503, 513), the decisions of state courts are frequently not helpful in this Court. However, petitioner refers (Br. 12) to "a considerable body of authority" from the state courts which he finds favorable to his position. Reviewing the state decisions, we find that the great weight of authority is against him.[22]

Of the eight state cases upon which petitioner places primary reliance (Br. 13), five[23] turn on special state statutes and may be ignored. See *Hale* v. *Henkel*, 201 U. S. 43, 64; *United States* v. *Thompson*, 251 U. S. 407, 416. The holdings in the remaining three do not support the petitioner.

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[22] Cases are collected in 31 A. L. R. 1479 (1924) and 59 A. L. R. 567 (1929).

[23] *Walker* v. *State*, 17 Ala. App. 555 (1920); *Dong Haw* v. *Superior Court*, 81 Cal. App. 2d 153 (1947); *Ex parte Stearns*, 68 Nev. 155 (1951); *People* v. *Levine*, 188 Misc. (N. Y.) 127 (1947); *Estill, Jr.* v. *State*, 43 Okla. Cr. 99 (1929).

State v. *Grady*, 84 Mo. 220 (1884), turned not upon the insufficiency of evidence, but the alleged complete absence of any evidence before the grand jury. In *Commonwealth* v. *Padden*, 160 Pa. Super. 269 (1947), the court overruled defense contentions that there was insufficient evidence before the grand jury, and in a later case (*Commonwealth* v. *Halleron*, 163 Pa. Super. 583, 586–587 (1949)), the same court held that an indictment would not be quashed if a competent *witness* was examined by the grand jury. *State* v. *Ivey*, 100 N. C. 539 (1888), held merely that after an indictment is quashed on formal grounds a North Carolina grand jury is not authorized to return a new indictment without hearing any witnesses whatever.[24]

Though it is not cited by petitioner, the first state case to quash an indictment for lack of legal or competent evidence was decided in 1855. *People* v. *Restenblatt*, 1 Abb. Pr. (N. Y.) 268. Perhaps the most significant aspect of this decision for our purposes is the court's wholly correct recognition (p. 271) that there was "no authoritative precedent" for its action.

[24] Like the Pennsylvania court in *Commonwealth* v. *Halleron*, *supra*, North Carolina has distinguished between disqualified witnesses and incompetent testimony, holding it no ground for a motion to quash that the grand jury returned an indictment on incompetent *testimony*. *State* v. *Levy*, 200 N. C. 586, 587–588 (1931). To the same effect, see *People* v. *Looney*, 314 Ill. 150, 155 (1924); *Summers* v. *State*, 63 Ga. App. 445 (1940).

On the other hand, a number of states hold, in harmony with the common-law rule, that no inquiry into the competency or sufficiency of the evidence before the grand jury is permitted. *Mack* v. *State*, 203 Ind. 355, 366–367 (1932); *Richardson* v. *State*, 100 Fla. 835, 840 (1930); *State* v. *Dailey*, 72 W. Va. 520, 520–522 (1913); *State* v. *Dallao*, 187 La. 392, 420–421 (1937), appeal dismissed, *Dallao* v. *Louisiana*, 302 U. S. 635, rehearing denied, 302 U. S. 777; *Commonwealth* v. *Walsh*, 255 Mass. 317, 319 (1926); *Barnes* v. *State*, 134 Tex. Cr. 461, 463 (1938); cf. *Sadler* v. *State*, 124 Tenn. 50, 54–55 (1910). In Arkansas, even though a statute provides that "the grand jury can receive none but legal evidence", it has been held that the trial court may not review the grand jury's proceedings on motion to quash to determine whether the indictment was based upon legal evidence. The Arkansas court holds that the statute "is directed to the grand jury, and that a failure to observe the statute does not afford grounds for quashing an indictment." *Murphy* v. *State*, 171 Ark. 620, 622 (1926). Cf. *Lorenson* v. *Superior Court*, 35 Cal. 2d 49, 55–59 (1950);[25] and see pp. 21–22, 34–35, *supra*. And in New Jersey the rule is that on a motion to quash the question of whether the evidence before

[25] In the *Lorenson* case (pp. 55–56), the California court recalled that, whatever changes have been effected under statutes, at common law "an indictment returned by a grand jury was unimpeachable."

the grand jury was competent is irrelevant unless misconduct was involved. *State* v. *Ellenstein*, 121 N. J. L. 304, 310 (1938).

We submit that, insofar as they may be persuasive in this Court, the weight of the relevant state cases supports the decision below. These decisions bear witness to the continued vitality of the grand jury as an independent body of laymen, uncontrolled by the technical rules of evidence enforced in determining guilt. Even more significantly, they reflect in general an awareness that, however local rules may change it, this is the principle of the common law, which is embodied in the Federal Constitution.

D. THERE IS NO SOUND REASON IN POLICY FOR A GENERAL RULE WHICH WOULD INVALIDATE AN INDICTMENT BECAUSE THE GRAND JURY ACTED ON EVIDENCE WHICH WOULD BE EXCLUDABLE AT A TRIAL AS HEARSAY

The imposing considerations of practical good sense which weigh against petitioner's views are persuasively outlined in the opinion of Judge Hand for the court below (Ex. Vol. pp. 153–157). We review these arguments here.

1. *The hearsay objection, designed to insure the benefit of cross-examination before the petit jury, has no appropriate place in grand jury proceedings.* Hearsay evidence is not in its nature necessarily unreliable. "Indeed," as the court below observed (Ex. Vol. p. 155), "we conduct our most serious affairs upon the strength of it; it would be impossible to carry on a day's business

without it." Nevertheless, because the use of hearsay forecloses the valuable benefit of cross-examination, such evidence is excluded on objection at a trial. See V Wigmore, *Evidence* (3d ed.) § 1362. On the other hand, it is familiar learning that hearsay admitted without objection "is to be considered and given its natural probative effect as if it were in law admissible" even where it serves as a part of the evidence for conviction by a petit jury. *Diaz* v. *United States*, 223 U. S. 442, 450.

These familiar principles show the impropriety of petitioner's effort to apply the hearsay rule to the lay deliberations of grand juries, which merely initiate the criminal proceeding and do not finally determine guilt. As Wigmore concluded (I *Evidence* (3d ed.), p. 21):

> Proceedings before a grand jury are both "ex parte" and interlocutory; moreover, the grand jury only seeks for a "probable cause"; hence, on all principles, the jury-trial rules of Evidence should not apply. Moreover, in point of policy, no rules should hamper their inquiries, nor need a presentment amounting only to probable cause be based on a system of rigid sifting of evidence * * *.

The anomalies which flow from petitioner's contrary argument are obvious. Though there is no cross-examination as to *any* testimony, the grand jury's determination, if it rests on hearsay, is to

be set aside because it denies the right of cross-examination. Though the prospective defendant actually has no opportunity to object at any point, he might have objected if the grand jury were a trial jury, and so must have the indictment set aside and his otherwise proper conviction reversed. Unlike a petit jury, the lay grand jury does not have the ready advice or directions of a judicial officer as to what evidence is "incompetent" or "hearsay"; it may have to decide that issue for itself at the peril of its indictment.

The illogic does not end here, however. Because of its wholly different context, an objection to hearsay must be sustained at a trial since, leaving aside the case of harmless error, it cannot be known how far the petit jury was influenced by the evidence improperly admitted. The most extreme rule for which petitioner can hope, on the other hand, would permit a grand jury's total reliance on hearsay provided only there was some modicum of competent evidence before it. Cf. *Holt* v. *United States*, 218 U. S. 245, 247–248. The resulting "amorphous compromise" (Ex. Vol. p. 155) has nothing to recommend it.

In the instant case, for example, the rule petitioner proposes would presumably have been satisfied had the witness William N. Murphey been shown to have appeared before the grand jury to testify that the income tax returns before them

were indeed those which had been filed by the petitioner (see R. 88a–90a). Or the 103 witnesses who later testified to petitioner's expenditures might have been paraded before the grand jury (see Ex. Vol. 46–48). Either or both of these steps would have left the grand jury without the total picture on which it acted, the picture supplied by the agents from their investigation, requiring at the trial the specific details and authentications of virtually all of the other 141 witnesses. See *supra*, pp. 5–7.[20] In those circumstances, it would have remained most probable that the grand jury's reliance had been on hearsay evidence, but petitioner's present complaint would not have been available. The incongruity of such a distinction suggests that only a groundless insistence upon irrelevant forms may be at stake here—forms imported from an alien context, designed only "to make of the grand jury a pawn in a technical game instead of respecting it as a great historic instrument of lay inquiry into criminal wrongdoing." *United States* v. *Johnson*, 319 U. S. 503, 512.

2. *Unless the historic independence and secrecy of the grand jury are to be impaired, the rule*

[20] Nor would such a presentation have been likely to disclose any flaws in the Government's case of the kind warned against in *Holland* v. *United States*, 348 U. S. 121. The main danger in a net worth prosecution is that the Government may not have unearthed all of the defendant's assets at the starting point, but as to this the witnesses *known* to the Government would normally have no knowledge.

petitioner seeks could work only haphazardly, and hence unequally.—The fortuitous basis on which the issue in this case arises helps to demonstrate the fallacy of petitioner's argument. His pre-trial motion to inspect the grand jury minutes and to dismiss the indictment (R. 82a-84a) was accompanied only by his affidavit to the effect that, since he was innocent of the charge, "the indictment, of necessity, must have been based upon no evidence at all or upon wholly incompetent and illegal evidence" (R. 84a). The propriety of denying the motion seems clear beyond doubt: on any other view, the mere plea of not guilty would make it necessary "to try over the proceedings before the grand jury in every case." *Kastel* v. *United States*, 23 F. 2d 156, 158 (C. A. 2), certiorari denied, 277 U. S. 604; *Cox* v. *Vaught*, 52 F. 2d 562 (C. A. 10); *United States* v. *Perlstein*, 120 F. 2d 276, 279 (C. A. 3); *Allen* v. *United States*, 89 F. 2d 954, 956 (C. A. 4). Cf. *United States* v. *Johnson*, 319 U. S. 503, 513; *Tarrance* v. *Florida*, 188 U. S. 519.

Thereafter, by cross-examination of all the Government's witnesses at the trial, petitioner developed the fact that none of them had testified before the grand jury except the three Treasury agents who had investigated the case (R. 1397a, 1575a, 1597a). This was the extent of the showing made, and it has been assumed

on this basis that the indictment rested solely on the "incompetent" testimony of the Treasury agents. We put to one side doubts as to the propriety of this conclusion, which was accepted by the court below (Ex. Vol. p. 152). Cf. *Livezey* v. *United States*, 279 Fed. 496, 498 (C. A. 5); *Shushan* v. *United States*, 117 F. 2d 110, 113 (C. A. 5).[27] And we note merely in passing that, had the Government objected to the interrogation of trial witnesses as to whether they had appeared before the grand jury, the sustaining of such objections would probably have been upheld since the questions were irrelevant to the issues at the trial. See *Carrado* v. *United States*, 210 F. 2d 712, 717–18 (C. A. D. C.); *Kraus* v. *United States*, 87 F. 2d 656, 661 (C. A. 8); *Allen* v. *United States*, 89 F. 2d 954, 956 (C. A. 4).

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[27] It may be noted, however, that the Government's proof of unreported income was based almost entirely upon documentary evidence, and that many of the documents were properly admitted at the trial without a certifying or authenticating witness, being certified in writing under seal by their custodians as official records and therefore admissible under Rule 44(a) of the Federal Rules of Civil Procedure (made applicable by Rule 27 of the Federal Rules of Criminal Procedure). (See R. 93a–97a, 141a–143a, 186a–189a, 194a–197a, 331a, 351a–354a, 400a–401a, 440a–442a, 587a, 651a–653a, 842a–844a, 1272a–1274a, 1356a–1357a, 1370a–1374a.) Petitioner made no showing that the Treasury agents who testified before the grand jury were not possessed of these documents, and therefore the courts below could properly have presumed that the documents were in fact before the grand jury. See *Shushan* v. *United States*, *supra*, at 113.

Even apart from the substantial problems these points might present, it is clear that petitioner's contention can arise only as a matter of happenstance and must depend for its resolution upon adventitious circumstances.

Whether a grand jury heard only hearsay or evidence otherwise incompetent is a matter not ordinarily determinable, as it is presumed to have been in this case, by questioning the witnesses at the trial. There is no assurance in any case that the testimony at the trial duplicates that presented to the grand jury. The defendant who makes an attempt like petitioner's, and is informed that one witness whose trial testimony would have been "competent" appeared before the grand jury, is presumably defeated in the argument petitioner urges. But that witness may have given only "incompetent" evidence to the grand jury. Moreover, as we have noted (*supra*, pp. 32, 51), the inference that there was some competent evidence before the grand jury by no means gives assurance that the indictment was not returned solely because of evidence which would have been incompetent at the trial.

These difficulties—in proving what was before the grand jury and in knowing what impelled the grand jury to indict—point to the ultimate consequences of petitioner's argument. Unless it is to operate only on the basis of accidental circum-

stances, the rule he proposes, as Wigmore observed (VIII *Evidence* (3d ed.) § 2364 at p. 731),

> logically obliges the Court to permit the indictment to be invalidated by the fact of the jury's reception of illegal evidence. In an ordinary trial, the record of proceedings, containing the exceptions, furnishes the means of establishing the fact, and the fact, when established, may be used to invalidate the verdict. But in the grand jury's proceedings, if the rule is to be enforced at all, as it is for petit juries, the fact must be allowed to be shown by the grand jurors, or others present. If, then, any community is willing to accept so deleterious a rule of criminal procedure, its enforcement in the only feasible way must be permitted by showing the facts.

In other words, if the trial rules of evidence are to be imposed upon the lay deliberations of grand juries, the sanctions and procedures which enforce the rules should follow. For if there is a right not to be indicted on hearsay or other incompetent evidence, it should entail the right to demonstrate a violation.

This in turn would mean, in the interests of equal justice, access to the grand jury's minutes. And though petitioner, while he invokes the Constitution, deprecates the cardinal principle of secret deliberations which has always attended our grand juries, this Court recently rejected a ruling which would have had similar consequences,

saying (*United States* v. *Johnson*, 319 U. S. 503, 513):

> Nothing could be more destructive of the workings of our grand jury system or more hostile to its historic status. That institution, unlike the situation in many states, is part of the federal constitutional system. To allow the intrusion * * * into the indispensable secrecy of grand jury proceedings—as important for the protection of the innocent as for the pursuit of the guilty—would subvert the functions of federal grand juries by all sorts of devices which some states have seen fit to permit in their local procedure, such as ready resort to inspection of grand jury minutes.

In sum, the arguments against petitioner's proposal in its full logical implications seem clear. The judicial supervision involved in applying trial rules of evidence would serve *pro tanto* to destroy the grand jury's historic function. Far from enforcing the Fifth Amendment, it would derogate from it, transferring to the courts powers confided to the independent judgment of laymen. The partial intrusion petitioner has urged is not less objectionable in principle. And it entails the additional vice of fostering a constitutional scheme in which rights turn, not on substantial fact, but on the vagaries of particular litigations. Moreover, petitioner has brought forward nothing in fed-

eral experience—recent or remote—which suggests the need for such a novel judge-made curb on the grand jury's powers and functioning.

E. IF INCOMPETENCY OF THE EVIDENCE BEFORE THE GRAND JURY MAY EVER INVALIDATE AN INDICTMENT, THE RULE SHOULD NOT APPLY TO THE COGENT, RELIABLE EVIDENCE INVOLVED HERE

We reemphasize, finally, the particular evidence involved in this case. As we have noted, this was testimony admitted, not excluded, at the trial (R. 1382a–1639a). The nature of this testimony (see *supra*, pp. 5–6, 15) leaves no doubt that it provided a solid basis for responsible action by the grand jurors—not motivated by prejudice or passion or mere idle rumor, but by a sober conviction that there was probable cause to bring petitioner to the trial which resulted in his conviction. At the very least, it would have assured people more learned in the law than grand jurors are supposed to be "that the legal evidence exist[ed]." *Charge to Grand Jury*, quoted *supra*, pp. 35–36.

The three agents were, in a real sense, the only ones (aside from petitioner himself) who were able to give the grand jury the overall picture of petitioner's finances and tax delinquencies. Each of the 141 witnesses who later testified at the trial could supply only isolated pieces of that picture, and none could give testimony sufficient in itself to tend to show petitioner's guilt. The agents had assembled the

necessary multitude of circumstances before the inquest began and were obviously equipped by training and official responsibility to inform the grand jury intelligently. Cf. *Grayson v. Lynch*, 163 U. S. 468, 480–481. Had the grand jurors found themselves unable to reach a decision on the agents' testimony and the unauthenticated documentary evidence alone, they could have called any or all of the other 141 witnesses to testify. We think the circumstances fully justified the grand jury in its decision that this was not necessary.

Considered in terms of the substance of the benefit afforded by the right not to be tried without indictment—the prevention of the suffering and expense caused by the trial of unfounded and irresponsible charges—this case surely meets the test. And so returning to the precedents, it is not surprising that the few cases like this one have all been decided contrary to petitioner's argument. *Banks v. United States*, 204 F. 2d 666, *supra*, p. 43; *Zacher v. United States* (C. A. 8), 1955 C. C. H. Fed. Tax Rep., par. 9745, *supra*, pp. 43–45; *Livezey v. United States*, 279 Fed. 496 (C. A. 5). It makes little difference ultimately whether decision turned on the theory that the evidence in question was "competent" because it was received at the trial (see *Banks* and *Zacher*) or, as here, on the broader ground that incompetency of the evidence before the grand jury was insufficient in itself to vitiate an

indictment and conviction. We submit that the result in each instance is correct. Each of these cases sustains an indictment reasonably deemed justified by grand jurors acting within the confines of their traditionally broad, substantially unreviewable, authority. The Constitution requires neither more nor less.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals, affirming petitioner's conviction, should be affirmed.

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